

THE SIZE BARRIER IN MERGER LAW— OR ANTITRUST BY THE NUMBERS

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"[T]he law does not make mere size an offense"¹

So spoke the United States Supreme Court almost fifty years ago when the antitrust laws of the United States were relatively new. At a time when this country had recently undergone one of the early waves of mergers and consolidations, Mr. Justice McKenna, writing for the Court in the *United States Steel* case,² asked: "Shall we declare the law to be that size is an offense even though it minds its own business because what it does is imitated . . . ? [This] corporation is undoubtedly of impressive size, and it takes an effort of resolution not to be affected by it or to exaggerate its influence."³ The Justice then continued saying: "we must adhere to the law *and the law does not make mere size an offense* or the existence of unexerted power an offense."⁴

A few years later, in *United States v. Swift & Co.*,⁵ Mr. Justice Cardozo said: "Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly . . . but size carries with it an opportunity for abuse"⁶

And Judge Learned Hand, in *United States v. Aluminum Co. of America*,⁷ stated: "The successful competitor, having been urged to compete, must not be turned upon when he wins."⁸ True, the court did find that Alcoa had achieved illegal status. Presumably though this was not by virtue of size alone but rather of what Justice McKenna would have called "exerted power" and Justice Cardozo, "abuse."

THE QUESTION

Thus, in three major antitrust cases dealing with the relevance and importance of size, it is stated that size, as such, is not to be condemned. In the cascade since these landmark cases, there has been no decision discovered by this writer which has explicitly taken issue

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¹ *United States v. United States Steel Corp.*, 251 U.S. 417, 451 (1920).

² 251 U.S. 417 (1920).

³ *Id.* at 451.

⁴ *Id.* at 451. (Emphasis added.)

⁵ 286 U.S. 106 (1932).

⁶ *Id.* at 116.

⁷ 148 F.2d 416 (2d Cir. 1945).

⁸ *Id.* at 530

with the doctrine that size, as such, is not a cardinal antitrust sin. Rather, those opinions which have chosen to address themselves to size itself have been willing to accept and endorse the holdings in earlier decisions.

Nevertheless, many lawyers and economists alike have concluded that the antitrust laws of the United States, particularly those relating to mergers and acquisitions, are being enforced in a way which penalizes bigness and which condemns without trial business conduct engaged in by industry leaders. It is suggested that when a large corporate defendant is before the bar, there arises a *prima facie* case of illegality: that is, bigness is badness unless proven otherwise. Economists, businessmen, and legal commentators have decried the attitude of the enforcement agencies and of the courts in their punishing big business and its successes, in their judging a corporation's conduct and motives according to the size of its balance sheet, and in their denying to companies already large and successful the opportunity to grow larger and more successful.⁹

Professor Jesse Markham¹⁰ has cited¹¹ *Brown Shoe Co. v. United States*¹² as the inception point of the "bigness is badness" philosophy. In criticizing the soundness of this philosophy, he has pointed out that "bigness" and "market power," like obesity and pregnancy, are conditions which look somewhat the same but require markedly different remedies.

Professor Carl Kaysen, co-author of the book, *Antitrust Policy*,¹³ and Associate Dean of the Graduate School of Public Administration, Harvard University, has noted that overall bigness "is not relevant to the issue of monopoly and competition; it is only bigness or smallness in relation to particular markets which is relevant to that issue."¹⁴

⁹ Address by John T. Chadwell, Competition and Section 1 of the Sherman Act—Instant Antitrust or Long Run Policy, Spring 1965 Meeting of Section on Antitrust Law of the American Bar Association, Washington, D.C.; Kaplan, Big Enterprise in a Competitive System, 200-01 (1964); Love, Wall St. Journal April 12, 1965, p. 14, col. 4; Seminar of the National Industrial Conference Board, "The Present War on Bigness"; Fourth Conference on Antitrust in an Expanding Economy, March 4, 1965; Address by M.J. Rathbone, A Businessman's View of Some Antitrust Problems—Particularly Mergers, Acquisitions and Corporate Size, Spring 1965 Meeting, Section of Antitrust Law, American Bar Association, Washington, D.C. in 27 A.B.A. Antitrust Section 56 (1965).

¹⁰ Professor of Economics, Princeton University, former chief of the Bureau of Economics of the Federal Trade Commission.

¹¹ "The Present War on Bigness," Seminar of the National Industrial Conference Board, Fourth Conference on Antitrust in an Expanding Economy, March 4, 1965.

¹² 370 U.S. 294 (1962).

¹³ Kaysen & Turner, *Antitrust Policy: An Economic and Legal Analysis* (1959).

¹⁴ *Supra* note 11. One of the problems encountered in studying this question is

Professor Robert Knox added that many "managers and directors of corporate enterprise . . . feel that the 'grow from within' dictum that is emerging from recent Supreme Court decisions on mergers is an unduly restrictive interpretation of the economic objectives of the antitrust laws."¹⁵ A former corporate executive asks whether arithmetic alone should be enough to place the burden of proof of non-violation on the accused.¹⁶

Are we developing a body of merger law which will make legal only those acquisitions and mergers which can clearly be proven to result in no advantage whatsoever to the acquiring company, no economies of scale, no edge in the competitive race, no management attraction?¹⁷ If such a doctrine is to prevail, perhaps the next step is to amend the pertinent statutes to flatly and totally prohibit the acquisition by one corporation of the stock or assets of another.

At least one Supreme Court Justice has expressed concern about the view that bigness is bad. Distressed by the majority opinion in the *Lexington Bank* case,¹⁸ an opinion which emphasized the size of the merger participants, Mr. Justice Harlan struck out at the "invocation of formulas of antitrust numerology." He saw the Court's

one of definition. Distinctions between the various aspects of size of the companies involved are not always clearly made in the legal and economic antitrust literature, including the opinions of courts and regulatory agencies. There is often a tendency to blur the lines between: (1) absolute size, as measured by sales, assets, number of employees, etc.; (2) rank in the industry, or in all manufacturing, or among all corporations; (3) relative size, measured by capacity or market share; and (4) disparate size, or difference in size among competitors. In addition, the number of sellers in a market may be an important consideration regardless of the dimensions of size listed above. For a discussion of several of these aspects and their relevance to effective competition in the economic sense, see Att'y Gen. Nat'l Comm. Antitrust Rep. 325-26 (1955).

¹⁵ Bus. Topics, March-June 1965, p. 42.

¹⁶ Address by M.J. Rathbone, *supra* note 9. See *United States v. Grinnell Corp.*, 1964 Trade Cas., ¶ 71298 (D.R.I.), a recent decision where the court said that a rebuttable presumption of monopolization under § 2 of the Sherman Act arose when the government had established that defendant had a predominant share of the relevant market. Defendant's burden of rebuttal could be met only by showing that its position was traceable to "superiority in means and methods which are 'honestly industrial.'" In *Permanente Cement Co.*, Trade Reg. Rep. ¶ 16885 (April 24, 1964), the FTC found a merger to be "within the presumption of unlawfulness established in *Philadelphia Bank*" and that Permanente had not made the "clear showing" required by *Philadelphia Bank* to overcome the presumption.

¹⁷ At least one recognized antitrust authority, Professor Robert H. Bork of the Yale University Law School, seems to fear this possibility. Address by Robert H. Bork, American Bar Association Symposium, August 1963 Meeting of the ABA, 23 A.B.A. Antitrust Section 319 (1963).

¹⁸ *United States v. First Nat'l Bank of Lexington*, 376 U.S. 665 (1964).

opinion as amounting to "a presumption that in the antitrust field good things come usually, if not always, in small packages."¹⁹ The conclusion of the Court that the merger was violative of the Sherman Act, said Justice Harlan, "collapses into the agreed premise that First Security [the resultant merger] is 'big.'"²⁰

Of course, not all agree that the courts are developing a *per se* attitude outlawing acquisitions by major companies. Commissioner Elman of the Federal Trade Commission stated that the Commission most emphatically was *not* adopting any view that

bigness *per se* is anti-competitive or undesirable and should be attacked under Section 7 or any other antitrust statute. . . . [S]ize is significant . . . only insofar as it is hugely disparate compared with the size of the firms in the relevant market.²¹

So the exchange of views goes on. Is the current enforcement of Clayton Act section 7²² merely a broad scale attack on big business, or is it the result of an objective, meaningful analysis of market behavior and likely market consequences made under appropriate congressional mandate? Do the antimerger laws allow room for selective, nonobjectionable corporate acquisitions by major companies; or have members of the Fortune 500 Club²³ achieved a status rendering them legally ineligible for further growth by merger?

MERGERS AND MARKETS

"Mergers and Markets," an economic study by Dr. Betty Bock, analyzes 1964 Supreme Court merger cases along with the complaints filed by the government that year.²⁴ The study considers the several rules and criteria controlling the Court's decisions in these cases, and seeks to suggest which factors are likely to be important in future cases. Our interest is in the criterion of size.

Dr. Bock's study includes all merger cases initiated by the Department of Justice and the Federal Trade Commission. Between 1951, when the 1950 amendment to the Merger Act became effective, and 1964, the Department and the Commission filed 143 complaints, each attacking an acquisition, or series of acquisitions, on the ground that

¹⁹ *Id.* at 673.

²⁰ *Id.* at 673, 679.

²¹ Procter & Gamble Co., Trade Reg. Rep. ¶ 16673, at 21582 (Nov. 26, 1963). This case is presently pending on appeal in the Sixth Circuit.

²² 38 Stat. 731 (1914), 15 U.S.C. § 18 (1965).

²³ "The 500 Largest U.S. Industrial Corporations," published annually by Fortune Magazine.

²⁴ Bock, Mergers and Markets, Studies in Business Economics, No. 87 (4th ed. 1965).

competition may have been substantially lessened or that a tendency toward monopoly was possible. Twenty-one of these cases were initiated in 1964. Facts concerning the absolute size of the acquiring or acquired company, or both, are alleged in approximately two-thirds of the merger complaints: that is, in less than one-third of the cases absolute size was not deemed to be material to the government's case. Indeed, the criterion of absolute size appears in more of the complaints than any factor other than market position and degree of concentration in the markets affected. Dr. Bock's statistics also show that the enforcement agencies' interests have been moving towards acquisitions of larger dimensions. Prior to 1964, the lowest annual sales figure alleged in complaints filed was 8 million dollars. By 1964, the lowest annual sales figure alleged was almost 60 million dollars. Similarly, the minimum asset size of acquired companies increased from about 8 million dollars valuation in the pre-1964 complaint period to ten times that size in 1964. Another measure of the increasing interest of the enforcement agencies in the larger companies is reported by Dr. Bock: during the pre-1964 period somewhat less than half of the companies whose sales figures were cited in complaints enjoyed annual sales volume in excess of 100 million dollars; in 1964 more than two-thirds of the companies were in this "100 million dollar and over" group.

These figures and others lead Dr. Bock to conclude that:

[I]t appears clear that the agencies are increasingly directing their attention to acquisitions by the larger companies of relatively large companies, or parts of companies Indeed, by 1964, the enforcement agencies appeared to have adopted a policy of avoiding attacks on smaller acquisitions by smaller companies in order to concentrate on the larger acquisitions by the larger companies in the more concentrated markets.²⁵

THE STATUTES²⁶

In 1950 Congress enacted the Celler-Kefauver amendment²⁷ to section 7 of the Clayton Act. The amendment broadened the pro-

²⁵ *Id.* at 18-19 (Emphasis added.)

²⁶ Bank Merger Act, 76 Stat. 953 (1962), 12 U.S.C. § 1828 (1964); Kefauver-Celler Acquisition of Corporate Stock Act, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964); Communications Act, 48 Stat. 1064 (1934), 47 U.S.C. §§ 151-55 (1964); Securities Exchange Act, 48 Stat. 881 (1934), 15 U.S.C. § 78a-78hhl (1964); Packers and Stockyards Act, 42 Stat. 159 (1921), 7 U.S.C. §§ 181-229 (1964); Federal Power Act, 41 Stat. 1063 (1920), 16 U.S.C. §§ 791a-823 (1964); The Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1964); Federal Trade Commission Act, 38 Stat. 717 (1914), 15 U.S.C. §§ 41-51 (1964); The Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1964); Interstate Commerce Act, 24 Stat. 379 (1887), 49 U.S.C. §§ 1-27 (1964).

²⁷ As amended, the pertinent paragraph of Clayton Act section 7 provides:

That no corporation engaged in commerce shall acquire, directly or indirectly,

scriptions of the Act to cover the acquisitions of assets as well as previously covered *stock* purchases. It also eliminated the requirement that the affected corporations be in horizontal competition one with the other; thus for the first time so-called vertical acquisitions (*i.e.*, acquisitions of one's suppliers or customers) and conglomerates (all others having requisite anticompetitive effects) were reached. The amended section 7 is totally lacking in any reference to "size," relative size, or disparity of size. What the courts have concluded as to the relevance and importance of size, absolute or relative, is another matter.

While section 7 of the Clayton Act is the key antimerger statutory provision, other federal statutes must be reckoned with as well. Section 1 of the Sherman Act makes illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," and section 2 of that Act declares "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States" guilty of a misdemeanor. At least one of the recent major merger cases was brought under the Sherman Act.²⁸

Section 5 of the Federal Trade Commission Act, which prohibits "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce," has been urged by the government and found by the Federal Trade Commission to be broad enough to reach acquisitions not within the ambit of the Clayton Act.²⁹ In addition, provisions restricting and limiting acquisitions and mergers may be found in other special industry regulatory statutes such as the Communications Act, Securities Exchange Act, Interstate Commerce Act, Federal Power Act, Packers and Stockyards Act, and the Bank Merger Act.³⁰

THE CASES

Brown Shoe Co. v. United States

The Supreme Court first interpreted the amended section 7 in 1962 when the acquisition of the G.R. Kinney Company, Inc. by the

the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

²⁸ *United States v. First Nat'l Bank of Lexington*, *supra* note 18.

²⁹ *Beatrice Foods Co.*, 3 Trade Reg. Rep. ¶ 17244 (April 26, 1965).

³⁰ *Supra* note 26.

Brown Shoe Company, Inc. was found to be in violation thereof.³¹ The Court's opinion includes a review of the legislative history of the Act and its 1950 amendment. The characteristics and background of the industry and companies involved were traced. Also, the Court reviewed all appropriate "factors" in light of which the merger is considered, analyzing the vertical and horizontal aspects of the transaction.

For our purposes we need not deal with all of the considerations which entered into the Court's finding that the merger did contravene the standards of the Act, and that the acquisition could reasonably be expected to lessen competition substantially or to tend to create a monopoly in a line of commerce or a section of the country. This case is principally significant here because in it, the first case under amended section 7, the Court emphasized the *size* of the two merging companies.

In the very first sentence of the factual description of the case, the Court describes the acquiring corporation as "the third largest seller of shoes by dollar volume in the United States, a leading manufacturer of men's, women's, and children's shoes, and a retailer with over 1,230 owned, operated or controlled retail outlets," and the acquired corporation as "the eighth largest company, by dollar volume, among those primarily engaged in selling shoes, itself a large manufacturer of shoes, and a retailer with over 350 retail outlets." And at a later point in the opinion the Court also says of the acquired company: "Kinney, with over 350 retail outlets, owned and operated the largest independent chain of family shoe stores in the Nation."³² With the stage thus set, the characters portrayed as "large" and "leading," the Court finds little trouble brushing aside Brown's urgings that there could be no serious diminution of competition resulting from a merger where the acquired company manufactured less than 0.5 percent and retailed less than 2 percent of the nation's shoes. Indeed, Brown itself produced only 4 percent of the national production, not a staggering percentage figure.³³

In comparison with the industrial giants, neither Brown nor Kinney can reasonably be characterized as large.³⁴ If this case has significance on the issue of size, it would seem to be the indication that merging companies need not be among the mammoths of the nation to invite application of section 7. Brown, which accounted for less than one-twentieth of the nation's shoe production, seemed to have

³¹ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

³² *Id.* at 297, 331.

³³ *Id.* at 298, 303.

³⁴ *Supra* note 24. Brown, after the acquisition, was not among the 250 largest United States companies, asset-wise.

been considered a large company, although the merger did make it one of the top four shoe producers.³⁵ An interesting statistic cited by the Court, presumably to add stature to Brown's industry position, is that the top four shoe manufacturers (of which Brown was the smallest) together produced 65 percent of the volume of shoes produced by the top 24 shoe manufacturers in the country.³⁶ The relevance of this particular combination of figures is somewhat elusive.

It seems clear that factors other than absolute size were deemed important by the Court in arriving at its decision in this case. Particularly emphasized was the evidence of fast moving trends of concentration in the industry, of integration between manufacturing and retailing, and of acquisitions in the industry generally and by Brown Shoe specifically. The Court found

"a definite trend" for the parent-manufacturers to supply an ever increasing percentage of the retail outlets' needs, thereby foreclosing other manufacturers from effectively competing for the retail accounts

Another "definite trend" found to exist in the shoe industry was a decrease in the number of plants manufacturing shoes.³⁷

Brown Shoe was found not only to have been a participant but a "moving factor," in these industry trends.³⁸ An impressive list of acquisitions by Brown of retail outlets is contained in the opinion; it is also pointed out that Brown previously acquired the stock or assets of several companies engaged solely in shoe manufacturing.³⁹

³⁵ *Id.* at 302-03.

³⁶ *Id.* at 300.

³⁷ *Id.* at 301.

³⁸ *Id.* at 302.

³⁹ *Id.* at 302-03. The Court said:

Although Brown had experimented several times with operating its own retail outlets, by 1945 it had disposed of them all. However, in 1951, Brown again began to seek retail outlets by acquiring the Nation's largest operator of leased shoe departments, Wohl Shoe Company (Wohl), which operated 250 shoe departments in department stores throughout the United States. Between 1952 and 1955 Brown made a number of smaller acquisitions: Wetherby-Kayser Shoe Company (three retail stores), Barnes & Company (two stores), Reilly Shoe Company (two leased shoe departments), Richardson Shoe Store (one store), and Wohl Shoe Company of Dallas (not connected with Wohl) (leased shoe departments in Dallas). In 1954, Brown made another major acquisition: Regal Shoe Corporation which, at the time, operated one manufacturing plant producing men's shoes and 110 retail outlets.

The acquisition of these corporations was found to lead to increased sales by Brown to the acquired companies. Thus although prior to Brown's acquisition of Wohl in 1951, Wohl bought from Brown only 12.8% of its total purchases of shoes, it subsequently increased its purchases to 21.4% in 1952 and

With respect to concentration, the record shows that in certain markets or submarkets the combined Brown-Kinney share of the business approximated 50 percent. In others it ranged from 33 percent to 50 percent.⁴⁰ Certainly these regional figures are of a somewhat different order of magnitude than the national figures of 0.5 percent and 2 percent cited in testimony of the defendants.

Particularly significant, not only to the disposition of this case but as a prelude to future Court action in section 7 cases, is the emphasis placed on the legislative history of the 1950 amendment. First, the Court broadly summarizes its review of the legislative history by stating that it has discerned no "unmistakably clear indication of the precise standards the Congress wished the Federal Trade Commission and the courts to apply in judging the legality of particular mergers."⁴¹ It did, however, find several expressions of consistent points of view sufficient to form a "usable frame of reference within which to evaluate any given merger."⁴²

The Court found "the dominant theme" to be "a fear of what was considered to be a rising tide of economic concentration in the American economy."⁴³ Hence, attention was given to the concentration and integration trends evident in the instant case. Presumably this "dominant theme" is sufficient to fully dispose of the Brown Shoe merger.

Beyond this, however, the Court lays great stress on indications in the legislative history that the framers of the amendments sought to guard against acquisitions of large companies by large companies and did not intend to restrict or prevent mergers between smaller business entities. The Court points out: "When concern as to the Act's breadth was expressed, supporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations"⁴⁴ According to the Court, this is consistent

to 32.6% in 1955. Wetherby-Kayser's purchases from Brown increased from 10.4% before acquisition to over 50% after. Regal, which had previously sold no shoes to Wohl and shoes worth only \$89,000 to Brown, in 1956 sold shoes worth \$265,000 to Wohl and \$744,000 to Brown. During the same period of time, Brown also acquired the stock or assets of seven companies engaged solely in shoe manufacturing. As a result, in 1955, Brown was the fourth largest shoe manufacturer in the country producing about 25.6 million pairs of shoes or about 4% of the Nation's total footwear production.

⁴⁰ *Id.* at 347-54.

⁴¹ *Id.* at 315.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Id.* at 319. In the congressional discourse, 95 Cong. Rec. 11486-87 (1949), Representative Celler said:

The objection that the suggested amendment would prohibit small com-

with the deletion by Congress of the word "community" in the original Act's description of the relevant geographic market. That deletion is "another illustration of Congress' desire to indicate that its concern

panies from merging has strangely enough been put forward by representatives of big business. This would seem almost like "Greeks bearing gifts."

Incidentally, several small business associations interested in the welfare of small business and the maintenance of free enterprise testified very vigorously in support of this bill. No small-business group appeared against it.

There is no real basis for this objection.

In the first place, the present language of section 7 as it relates to mergers by sale of stock is more restrictive than the language in the amended bill. Yet no case has been found where a small corporation had any difficulty or was criticized by the Federal Trade Commission for selling its business by selling its stock to another small corporation. The small corporations have not had to avoid the present language of section 7 by selling their assets in place of their stock, when they wanted to dispose of their business. Furthermore, the evidence shows that *it is only in large acquisitions by large corporations, which would have a tendency to create a monopoly*, where resort is had to the device of purchasing assets in lieu of capital stock when a merger is planned. Attention is also called to the list of acquisitions. None of these involve small corporations selling to other small corporations.

(Emphasis added.)

And Senator O'Connor, at 96 Cong. Rec. 16436 (1950) stated:

I think it is worth while to bear in mind the following considerations: First, as I have already indicated, the facts reveal that the great bulk of the mergers which have taken place in recent years have consisted of the absorption of a small company by a large company; the cases of two small companies merging are few and far between.

Second, the bill is aimed at preventing only those mergers which substantially lessen competition or tend to create a monopoly. *Obviously, those mergers which enable small companies to compete more effectively with giant corporations generally do not reduce competition but rather intensify it.*

Third, by a specific action, Congress has made it abundantly clear that it is not the purpose of this law to prevent mergers of this type. Thus, the original wording of section 7 of the Clayton Act, which, with regard to stock, is now on the statute books, prohibits a corporation from acquiring a competitor "where the effect may be to substantially lessen competition between the corporation whose stock is acquired and the corporation making the acquisition." Had this language been rigidly interpreted, it would have had the effect of preventing any company from buying the stock of any competitor, since the acquisition by one firm of a competitor not only "substantially lessens" but completely eliminates the competition which had formerly existed between them.

In the bill before us this stringent prohibition has been completely deleted. Instead of making the test of the law the effect of an acquisition on competition between the acquired and the acquiring companies, the proposed bill substitutes the more general test of the effect on competition generally in any line of commerce in any section of the country. And to come within the prohibition of the bill the effect on that competition must be "substantial."

(Emphasis added.)

was with the adverse effects of a given merger on competition only in an economically significant 'section' of the country."⁴⁵

The considerable emphasis with which the Court stresses the evidence of congressional intent to permit mergers by small but not large companies suggests a policy was being enunciated for future application in cases whose facts are more appropriate to invoke the "Big vs. Little" philosophy.

United States v. Philadelphia Nat'l Bank

Closely following the *Brown Shoe* case came Supreme Court consideration of the merger of two major Philadelphia banks.⁴⁶ The opinion in that case is streamlined for the Court saw no need to repeat or extend its analysis of the statutory test of the *Brown Shoe* case. Instead, it concluded that the "case present[ed] only a straightforward problem of application to particular facts."⁴⁷ Thereupon the Court straightforwardly found almost per se illegal any merger which places 30 percent or more of the market in the hands of the merged firms. The Court said that mergers which concentrate control of large market shares are inherently suspect and therefore ripe for injunction unless it be clearly shown that the feared anticompetitive effects will not occur.⁴⁸

This left the Court only the task of determining at what point size requires that a given merger be characterized as "inherently suspect." The Court's answer is in terms of market concentration:

The merger of appellees will result in a single bank's controlling at least 30% of the commercial banking business in the four-county Philadelphia metropolitan area. Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.⁴⁹

Thus the Court concluded that any merger which results in not less than 30 percent of the market being held by the merged firms is illegal

⁴⁵ *Brown Shoe Co. v. United States*, *supra* note 31, at 320.

⁴⁶ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

⁴⁷ *Id.* at 355.

⁴⁸ *Id.* at 363. Mr. Justice Brennan, writing for the Court, said:

we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects

Such a test lightens the burden of proving illegality only with respect to mergers whose *size* makes them inherently suspect

Ibid. (Emphasis added.)

⁴⁹ *Id.* at 364.

in the absence of a clear showing that the presumed anticompetitive effects will not obtain.⁵⁰

What comfort is to be taken from the suggestion by the Court that the presumption is rebuttable? The opinion itself offers very little encouragement. The Court regarded as "entitled to little weight" competitors' testimony that bank competition in Philadelphia would continue to be vigorous after the merger. It also found "of equally little value" the testimony that customers had ample alternative banking facilities available following the merger.⁵¹ One wonders why the testimony of competitors of merger participants is not valuable on the question of the vigor of competition in their industry and market. Also, why is evidence regarding the availability of alternative sources of the product or service involved likewise not relevant and important in an antitrust case? At least it should be given better treatment than being waved aside as "lay evidence" on a "complex economic-legal problem" not entitled to the reliance placed on it by the district court.⁵² With such areas of testimony discredited in favor of bare-bones arithmetic on share of the market, the evidentiary burden laid down in *Philadelphia Nat'l Bank* does come perilously close to a per se ruling. Numerology seems to be determinative.

But does this case stand for the proposition that absolute size is the determining factor in measuring a merger against the standards of section 7? There is little indication in the opinion that the absolute size of the merging institutions was determinative of the result. The numerology which impressed the Court here was in terms of percentages rather than absolute size dimensions.

The opinion does begin by pointing out that the two merging banks are the second and third largest in the Philadelphia area and that they will become number one if the merger is allowed.⁵³ But the interest of the Court is directed mainly towards concentration figures rather than power attributable to size alone. In fact, it is the defendants who press the size argument by urging that the resulting bank, with its greater prestige and increased lending limit, would be better

⁵⁰ It should be noted that although the Court seems disposed to simplify the ground rules for determining the illegality of mergers and with the establishment of the "30% or over is illegal" rule, it took care to point out that no corollary to this rule should be presumed; i.e., a merger accounting for less than 30% of the market is not necessarily legitimate under section 7. Nor is there any rebuttable inference created by the less than 30% statistic.

⁵¹ *United States v. Philadelphia Nat'l Bank*, *supra* note 46, at 367.

⁵² *Ibid.*

⁵³ *Id.* at 330-31.

able to compete with the large out-of-state banks.⁵⁴ The argument did not prevail. Presumably size, as such, is not deemed conclusive either way in the *Philadelphia Nat'l Bank* case.

Procter & Gamble Co.

The Federal Trade Commission decision in *Procter & Gamble Co.*,⁵⁵ followed the *Brown Shoe* and *Philadelphia Bank* cases, and it perhaps best illuminates the relevance and importance of size as a factor in determining the legality of a merger. Under consideration by the Commission was Procter's acquisition of Clorox.

The statement of facts in the Commission's decision credits Procter with being one of the nation's fifty largest manufacturers, with total net sales in 1957 of 1,156,000,000 dollars. While Procter manufactured a wide range of household consumer items sold through grocery, drug, and department stores, it did not, prior to the acquisition of Clorox, produce household liquid bleach. In packaged detergents, Procter's sales were almost a half billion dollars and accounted for 54.5 percent of the national total. In the household cleaning agents industry, Procter and its two largest competitors accounted for more than 80 percent of the total sales, Procter being the leading firm of the three.

At the time of the acquisition, Clorox was the nation's leading manufacturer of household liquid bleach with annual sales of slightly less than 40,000,000 dollars which represented almost 50 percent of the national total. Clorox and its next largest competitor accounted for almost 65 percent of the nation's household liquid bleach sales and these two together with the next largest four manufacturers accounted for almost 80 percent.

The acquired corporation had not been in competition with the acquiring corporation nor had either been a customer or supplier of the other. Hence, the acquisition could not be easily characterized as either horizontal or vertical. Accordingly, the hearing examiner had treated it as a "conglomerate" acquisition.⁵⁶ However, the Federal Trade Commission noted that it constituted a "merger of sellers of functionally closely related products which are not, however, close substitutes," and the Commission decided to style it as a "variant of the conventional horizontal merger."⁵⁷ After considering the several respects in which liquid bleach is compatible with and related to the major product lines of Procter the Commission concluded:

⁵⁴ *Id.* at 370.

⁵⁵ Trade Reg. Rep. ¶ 16673 (Nov. 26, 1963). This case is pending appeal in the Sixth Circuit.

⁵⁶ *Id.* at 21565.

⁵⁷ *Ibid.*

By this acquisition, then, Procter has not diversified its interests in the sense of expanding into a substantially different, unfamiliar market or industry. Rather, it has entered a market which adjoins, as it were, those markets in which it is already established, and which is virtually indistinguishable from them insofar as the problems and techniques of marketing the product to the ultimate consumer are concerned.⁵⁸

Having thus characterized the acquisition as a semiconglomerate, *i.e.*, a variant of a horizontal merger, the Commission noted the absence of authoritative, specific precedents in this area, and undertook to review basic principles with respect to the interpretation and application of section 7 and to enunciate guidelines for future decisions relating to such mergers. Our interest is in the significance which is given the *size* of the merging companies.

The Commission felt the merger would give rise to substantial cost savings and other advantages in advertising and sales promotion, especially in television advertising. Specifically, greater annual volume discounts are available to the largest network television advertisers; similar advantages exist with other advertising media. Thus, the acquisition by Procter enables Clorox to pare its advertising budget, an advantage unavailable to its smaller competitors.

Replying to the defendant's argument that advantages of scale should not be relied upon to find a merger unlawful and thus to penalize efficiency, the Commission asserts that the "efficiencies [of] the kind involved in this merger, far from representing a net social benefit, [are] independently offensive to at least the spirit, if not the letter, of the antitrust laws."⁵⁹ Such savings, says the Commission, are "achievable only by firms of very large absolute size [and] bear little relationship to ordinary notions of economic 'efficiency.'"⁶⁰ Apparently, if bigness is evil, benefits flowing from bigness must, too, be "offensive."

The Commission discusses in considerable detail other advantages which accrued to Clorox upon being acquired by a large household consumer products company. Among those mentioned were the possibility of joint product promotion and the opportunity to pressure retailers into giving favored treatment to Clorox. Another important consequence of the merger is the advent, in the liquid bleach industry, of a

⁵⁸ *Id.* at 21566.

⁵⁹ *Id.* at 21585.

⁶⁰ *Id.* at 21585-86. Aside from dollar savings, the Commission points out that a multi-product national advertiser like Procter, which can arrange for its commercial announcements to occur during the course of the program period, has a distinct advantage over the smaller single product advertiser whose commercial messages will be inserted during the between-program station breaks.

firm with a breadth of experience and degree of financial strength beyond anything possessed by the other industry members. Financial ability enables the seller to offer a special price to the merchant so regional price cutting will now be one of the tools available to advance the cause of Clorox. The Commission envisioned that "in a price fight to the finish, Procter, whose aggregate scale of operations and fiscal resources dwarf the entire liquid bleach industry, can hardly be bested."⁶¹ It was suggested that "Procter . . . may engage in systematic underpricing having most unfair and destructive effects even though the firm is wholly innocent of any predatory intent."⁶²

Quite apart from these several "concrete competitive advantages" which stem from Procter's acquisition of Clorox, the Commission found that "some account must be taken of certain intangibles . . . [including] Procter's history of success, its general size and its prowess, which loom large in the eyes of the small liquid bleach firms, [and which] must for that reason alone be reckoned significant competitive factors."⁶³

The Commission's sensitivity to size is again reflected in the view that "a small or medium-sized firm contemplating entry cannot ignore the fact that Procter is a billion dollar corporation whose marketing experience extends far beyond the limited horizons of the liquid bleach industry and whose aggregate operations are several times greater than those of all the firms in the industry combined."⁶⁴ This sensitivity is also reflected in the statement that, as a general principle of section 7 interpretation, "financial strength and large absolute size may be indispensable attributes in enabling a substantial market share to be acquired and maintained in" an industry such as the one under consideration.⁶⁵

In summary, it is probably fair to say that the size factor totally permeates this opinion. True, the Commission insists that it is not bigness per se which is being attacked but rather disparity of size and consequences of size which obtain in the special circumstances of this case.⁶⁶ However, if overpowering advantage is attributed to size (as it is in the *Procter* opinion), the approach to consideration of a merger of "large" companies most likely includes a strongly weighted presumption of illegality.

⁶¹ *Id.* at 21578.

⁶² *Ibid.*

⁶³ *Id.* at 21578-79.

⁶⁴ *Id.* at 21579.

⁶⁵ *Id.* at 21571.

⁶⁶ *Id.* at 21582.

SUBSEQUENT ADJUDICATIONS

In merger law, lower court decisions seem to be peculiarly unreliable as an indication of what the law is. Accordingly, this paper will not attempt a general coverage of lower court decisions.⁶⁷ It is worthy of note, however, that the first half dozen or so merger cases to be decided at the district court level following the *Brown Shoe* decision all resulted in decisions upholding the validity of the challenged merger.⁶⁸ For a year or so, while these cases were decided, defense counsel enjoyed a surge of encouragement. This was despite the fact that the *Brown Shoe* decision itself had been generally regarded as a significant victory for the government and was expected to result in the outlawing of any merger with potential competitive effect of any substance.

The epidemic of losses sustained by the Government in these post-*Brown Shoe* decisions evokes a question: Do recent trial court decisions in merger cases indicate a trend toward narrowing the scope of section 7 of the Clayton Act? The answer is no. Supreme Court decisions made it clear that in the field of merger law trial court decisions

⁶⁷ One recent district court decision suggests the possibility of an interesting expansion of the doctrine of "no acquisitions by large companies permitted." In *Smith-Victor Corp. v. Sylvania Elec. Prods., Inc.*, 1965 Trade Cas., ¶ 71485 (Feb. 1, 1965), plaintiff sought to recover damages from Sylvania alleging that a series of earlier acquisitions had enhanced the competitive position of Sylvania to the detriment of small companies with limited resources (including plaintiff), who prior to Sylvania's entry alone produced lighting equipment for the amateur motion picture photographer. Sylvania entered this line of commerce after the complained of acquisition by General Telephone and Electronics Corporation, which merger allegedly provided Sylvania with a new "deep pocket" set of advantages. The court denied recovery, pointing out that in all of the cases decided earlier under section 7, at least one of the companies involved in the merger or acquisition had been engaged in the relevant line of commerce at the time the merger or acquisition was consummated. This was not so in the instant case. The court said: "If the plaintiff's complaint were upheld, a competitor could ask the court to prevent any large company that had a history of mergers from entering into competition in any new field that is comprised of small competitors." The district court was unwilling to thus "increase the scope of Section 7." It will be interesting to see whether the Supreme Court is equally reluctant if this case comes before it.

⁶⁸ *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), reversing unreported dismissal by United States District Court for the District of Utah; *FTC v. Consol. Foods*, 329 F.2d 623 (7th Cir. 1964), *rev'd*, 380 U.S. 592 (1965); *United States v. Continental Can Co.*, 217 F. Supp. 761 (S.D.N.Y. 1963), *rev'd*, 378 U.S. 441 (1964); *United States v. Penn-Olin Chem. Co.*, 217 F. Supp. 110 (D. Del. 1963), *rev'd*, 378 U.S. 158 (1964); *United States v. Lever Bros.*, 216 F. Supp. 887 (S.D.N.Y. 1963); *United States v. Aluminum Co. of America*, 214 F. Supp. 501 (N.D.N.Y. 1963), *rev'd*, 377 U.S. 271 (1964); *United States v. Bliss & Laughlin, Inc.*, 202 F. Supp. 334 (S.D. Cal. 1962), *vacated*, 371 U.S. 70 (1962).

have been mere way-stations to reversal. In every case save one, the Supreme Court determined the merger involved to be illegal.⁶⁹

With the pattern "approval by the lower court, reversal on appeal" the rule, the key question for defense counsel became: Will the Solicitor General carry my case to the Supreme Court?

The following is a review of the post-*Brown Shoe* cases.

*The Lexington Bank Case*⁷⁰

In this case the Government claimed that the merger of two major banks in Lexington, Kentucky, was violative of sections 1 and 2 of the Sherman Act. This case is principally significant in that it is the first adjudication which challenged a merger under the Sherman Act since the amendment of section 7 of the Clayton Act.⁷¹ However, the case is also significant as one in which size, absolute or relative, was an important factor.

Prominent among "facts relative to the alleged restraint of trade under the Sherman Act," are: (1) the size of First National, the acquiring bank, and its five competitors including Security Trust, the acquired bank, and (2) the market concentration figures of the banking institutions in Lexington before and after the merger. The Court concludes that significant competition would be eliminated by the merger, and it emphasizes testimony in the record that "the 'image' of 'bigness' is a powerful attraction to customers, an advantage that increases progressively with disparity in size." Also stressed were the multiplicity of extra services which the new company could offer in the trust field which extra services would tend to foreclose competition there.⁷²

The Court then cited *Northern Sec. Co. v. United States*⁷³ for the Sherman Act holding that "it was enough that the two [merger participants] competed, that their competition was not insubstantial, and that the combination put an end to it."⁷⁴

Why, if the sole test being applied is whether or not the two banks engage in substantial competition, is the size of the merging institutions stressed? Why the reference to indicia of size and "image of bigness"?

⁶⁹ *Ibid.* However, in *Penn-Olin*, the District Court for the District of Maryland on remand from the Supreme Court in a decision unreported at the date of writing held the Government failed to sustain the burden of establishing a reasonable probability that either Pennsalt or Olin Mathieson would have entered the market on its own. Accordingly, the court entered a judgment dismissing the case.

⁷⁰ *United States v. First Nat'l Bank of Lexington*, 376 U.S. 665 (1964).

⁷¹ *Id.* at 679. Mr. Justice Harlan observes that the case is not really a Sherman Act case but "is, if anything, a Clayton Act case masquerading in the garb of the Sherman Act."

⁷² *Id.* at 668-69.

⁷³ 193 U.S. 197 (1904).

⁷⁴ *United States v. First Nat'l Bank of Lexington*, *supra* note 70, at 670.

Perhaps the Court has fallen into a pattern of laying stress on the size of the merging firms and does so as a matter of habit, even in cases where size is not critical to the decision.

In any event, the *Lexington Bank* case appears to view size as a condemnable characteristic, even though Mr. Justice Harlan perhaps goes a bit far in saying (in dissent) that the *only* factual basis for the Court's decision rests on "the statistics unquestionably showing that First National and Security Trust (the merging banks) were big and First Security (the merged bank) is bigger." His prediction that the majority opinion in this case is a "bludgeon" which will now be used against "combinations which may well have no fault except 'bigness'" seems a trifle too gloomy.⁷⁵

*United States v. El Paso Nat'l Gas Co.*⁷⁶

This is probably not one of the more critical cases concerning the size of merging companies. El Paso, the sole out-of-state supplier of gas into the California market, acquired Pacific Northwest Pipeline Corp. The latter company had not been supplying gas to California customers but had recently made plans to enter that market and had reached tentative agreement to serve the California gas needs of one of El Paso's major customers there.

The acquired company was described in the Supreme Court opinion as "no feeble, failing company" but one of two "major interstate pipelines serving the trans-Rocky Mountain States It had adequate reserves and managerial skill," and "it was so strong and militant that it was viewed with concern, and coveted, by El Paso." All of this qualified it as important potential competition, the absorption of which violated section 7.⁷⁷

While the case is more notable in its holding that approval by a federal regulatory agency under a special industry regulation statute does not create antitrust law immunity (the Federal Power Commission had approved this merger before the Department of Justice commenced action), the opinion is consistent with a view that size in a given market is an important, if not the controlling, factor in the evaluation of a merger.

*The Rome Cable Case*⁷⁸

This decision is perhaps the most significant "size" decision of the Supreme Court under amended section 7. Alcoa has long been one of

⁷⁵ *United States v. First Nat'l Bank of Lexington*, *supra* note 70, at 680.

⁷⁶ 376 U.S. 651 (1964).

⁷⁷ *Id.* at 661-62.

⁷⁸ *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964).

the industrial giants of the United States. It should not have come as a surprise, then, when the United States Supreme Court struck down its acquisition of Rome Cable Company, a relatively small specialty manufacturer of copper products. Not, that is, if bigness of the acquiring company is the standard of illegality under section 7 of the Clayton Act. Mr. Justice Douglas, writing for the majority, implies just that to be the law although there is very little direct reference to size in his opinion.

The Supreme Court decision must be read together with the district court decision which it reverses⁷⁹ to give full meaning to the holding of the Court on the question of size. The district court had declared the merger to be legal, finding Alcoa's acquisition of Rome Cable, primarily a manufacturer of copper wire and cable products, to be essentially a product diversification and "know-how" acquisition.⁸⁰ Although, in the district court's view, the merger may have produced certain advantages for the acquiring company, it did not provide advantages of the type condemned by section 7. "[I]ncrease in its scientific knowledge" and "diversification of its line of salable products" would seem to be legitimate goals not proscribed by the Clayton Act, said the court.⁸¹

The district court was aware of the size of Alcoa. Reminiscent of the *U.S. Steel* case⁸² of fifty years earlier, the court stated that "care . . . must be taken not to exaggerate its influence because of its size alone, especially in the absence of evidence of the abuse of the power which goes with size The mere intrusion of 'bigness' into a competitive market will not in itself violate the statute."⁸³

Measuring the facts of the case against the total battery of tests prescribed in *Brown Shoe*, the court concluded that the required substantial lessening of competition or tendency towards monopoly was not shown.

Critical to the lower court decision was the determination of the relevant product markets involved. The court painstakingly considered ten potential markets and submarkets, weighed each against the product market indicia of *Brown Shoe*, and made findings as to what con-

⁷⁹ *United States v. Aluminum Co. of America*, 214 F. Supp. 501 (N.D.N.Y. 1963).

⁸⁰ Alcoa is described by the Supreme Court as "a leader in markets in which economic power is highly concentrated. Prior to the end of World War II it was the sole producer of primary aluminum and the sole fabricator of aluminum conductor. It was held in 1945 to have monopolized the aluminum industry in violation of Section 2 of the Sherman Act." 377 U.S. at 277.

⁸¹ *United States v. Aluminum Co. of America*, *supra* note 79, at 519.

⁸² *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

⁸³ *United States v. Aluminum Co. of America*, *supra* note 79, at 515.

stituted actual "lines of commerce" in this case.⁸⁴ The court concluded there was no substantial overlap nor were there substantial competing products between Alcoa and the acquired company. The merger was upheld.

On appeal the Supreme Court reversed the trial court in its determination of relevant markets. By redefining certain of the product markets and submarkets, the Court was able to construct a submarket in which Alcoa and Rome competed. The Court concluded that the acquisition added a 1.3 percent share of this reconstructed submarket to Alcoa's premerger share.⁸⁵ This sliver the Court found "reasonably likely to produce a substantial lessening of competition within the meaning of § 7." On this basis, the Court ordered divestiture, accomplishing the "preservation of Rome," rather than permitting "its absorption by one of the giants."⁸⁶ The Court stated that the continued presence of small competitors was necessary to thwart the tendency towards oligopoly in the aluminum industry. Pointing out that Rome was "an aggressive competitor" and a "pioneer in aluminum insulation," Mr. Justice Douglas said: "Rome seems to us the prototype of the small independent that Congress aimed to preserve by section 7."⁸⁷

It is difficult to escape the conclusion that the Supreme Court, in viewing the Alcoa-Rome merger, was much moved by the hugeness of the acquirer, the shadow of the old Aluminum Company monopoly, and the smallness of the acquired. It thus decided the merger must not be sustained. The redefinition of the product markets was a convenient bridge. Apart from this explanation, this writer, like the three dissent-

⁸⁴ *Id.* at 509-11. According to Mr. Justice Stewart's dissent to the Supreme Court's decision, the lower court ruling was

a long and careful opinion, accompanied by meticulous findings of fact and thoroughly reasoned conclusions of law . . . (in which) the trial judge conscientiously applied the standards postulated by this Court in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, and made detailed findings of fact fully supporting his determinations.

377 U.S. at 282.

⁸⁵ *United States v. Aluminum Co. of America*, *supra* note 78, at 280. Conceding the district court's finding of some competition between aluminum and copper conductors, the Court nevertheless found submarkets comprised solely of aluminum conductors. First, the Court found insulated aluminum conductors to comprise a separate submarket due to its decisive advantages in overhead distribution lines; Rome produced 4.7% of insulated aluminum conductors in 1958. This finding further led the Court to construct another broader submarket comprised of both bare and insulated aluminum conductor used in overhead electrical utility lines (transmission and distribution), in which line of commerce the Court ultimately found a substantial lessening of competition.

⁸⁶ *Id.* at 281.

⁸⁷ *Ibid.*

ing Justices, "find[s] it difficult to understand the Court's conclusion and impossible to agree with it." The district court had done "a careful and thoughtful job. It applied the proper law, and its reasoning seemed sound. . . ."⁸⁸

The lower court opinion noted that "the Government's contention as to the dominance of Alcoa appears to rest upon size alone without evidence as to the exercise of the power that goes with it."⁸⁹ So also does the majority opinion of the Supreme Court. *Rome Cable* is a "size" case.

*United States v. Penn-Olin Chem. Co.*⁹⁰

This case is primarily an affirmation of the applicability of merger law to joint ventures, and secondarily an expression of the Court's views on the relevance of potential competition under section 7. Also, the case is of interest on the issue of size, and how size relates to both the concept of potential competition and the device of joint ventures.

Olin Mathieson and Pennsalt, two corporations engaged in manufacturing and selling somewhat related lines of chemicals, had each considered independently the possibility of entering the southeastern region of the United States with a sodium chlorate facility. They decided instead to form jointly the Penn-Olin Chemical Company, a fifty-fifty joint venture, to carry on that business. The lower court upheld the venture as legal, holding that it could not be reasonably concluded that *both* parents would have entered the market had there been no joint venture. It stated that there was no reason to suppose that the joint venture would be a less effective competitor than either parent alone would be. In fact, the lower court thought the contrary was likely.

The Supreme Court remanded, concluding first, as a matter of law, that the creation of a joint venture is a transaction subject to section 7. Secondly, it felt that the court erred in failing to make a finding as to the reasonable probability of *either* of the parents entering the market while the other remained a potential entrant. The Court's description of the facts does take note of the absolute size of both parent companies (Olin with assets and sales of about three-quarter billion dollars, Pennsalt about 100 million dollars). Also, the Court, in alluding to the importance of potential competition, stated:

The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting

⁸⁸ *Id.* at 284.

⁸⁹ *Supra* note 79, at 515.

⁹⁰ 378 U.S. 158 (1964).

anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.⁹¹

And finally, among the criteria which the Court listed for the guidance of the trial court on remand were: (1) the power of the competitors in the relevant market, (2) the power of the joint venturers, (3) the power of each in dealing with the competitors of the other, and (4) the potential power of the joint venture in the relevant market.

Thus, joint venture activity, on the part of large companies, seems highly suspect, at least in any market in which either parent is a substantial potential competitor. It is even possible that an unduly broad definition of what constitutes "potential" competition could transform the *Penn-Olin* decision into a virtual per se ruling against joint ventures where the parent companies are large.

*United States v. Continental Can Co.*⁹²

In 1956, Continental Can Company, the nation's second largest producer of metal containers, acquired Hazel-Atlas Glass Company, the nation's third largest producer of glass containers. The Government's request for a divestiture order under section 7 of the Clayton Act was denied by the district court.

The lower court found that metal containers and glass containers constituted two different lines of commerce. Although each of the participants to the merger was a major factor in one of these lines, neither was in both. However, the court did recognize a certain amount of vigorous "inter-industry" competition. The district court found that the government had failed to prove a reasonable probability of anti-competitive effect in any one line of commerce, and accordingly it dismissed the complaint.⁹³

The Supreme Court, presented with the same economic facts, decided to combine glass and metal containers into one relevant market, thus, in theory at least, bringing the merged companies into competition with one another. This supported a finding of a reasonable probability of anticompetitive effect in the broader product market.⁹⁴

⁹¹ *Id.* at 174.

⁹² 378 U.S. 441 (1964).

⁹³ *United States v. Continental Can Co.*, 217 F. Supp. 761 (S.D.N.Y. 1963).

⁹⁴ The district court traced the competitive interplay between glass and metal containers. Baby food, at one time packed entirely in metal cans, had shifted to the use of glass almost exclusively. Conversely, the soft drink business had been considered as predominantly a glass container industry and was then in the process of moving toward the use of metal cans. The court also took note of the intense competitive battle in behalf of the beer can and beer bottle being waged by the respective industries and individual manufacturers.

Having deemed the single combined market to be the relevant one, the Court concluded that the size and share-of-market statistics of the industry easily supported a finding of violation.⁹⁵ The Court saw no necessity to inquire beyond the indicia of bare size, stating: "Where a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anticompetitive effects may be dispensed with in view of § 7's design to prevent undue concentration."⁹⁶ The Court also takes note of the fact that "the resulting percentage of the combined firms approaches that held presumptively bad in [the *Philadelphia Bank* case and] the incremental addition to the acquiring firm's share is considerably larger than in [*Rome Cable*]."⁹⁷

The dissent objects to the Court's combining two distinct lines of commerce in order to invent a third one "the existence of which no one, not even the Government, has imagined; for which businessmen and economists will look in vain; a line of commerce which sprang into existence only when the merger took place and will cease to exist when the merger is undone."⁹⁸ The dissent particularly criticizes the adoption of the "shortcut" *Philadelphia Bank* analysis when the merger is between companies of only "related" industries. Dissenting Justice Harlan concludes that the Court has, in effect, laid down "a *per se* rule that mergers between two large companies in related industries are presumptively unlawful under § 7."⁹⁹

It is difficult to quarrel with the "per se presumption" characterization of this case. Large companies having related product lines merge at their peril.

*FTC v. Consolidated Foods Corp.*¹⁰⁰

The *Consolidated Foods* case involves a major retailer's acquisition of a relatively small processor of seasonings. A generally unsuccessful attempt was thereafter made to pressure the acquiring company's

⁹⁵ The Court said:

Continental's major position in the relevant product market—the combined metal and glass container industries—prior to the merger is undeniable. Of the 59 billion containers (glass and metal) shipped in 1955 . . . Continental shipped 21.9% Of the six largest firms in the product market, it ranked second Hazel-Atlas was the third largest glass container manufacturer Its annual sales amounted to \$79 million, its assets exceeded \$37 million

United States v. Continental Can Co., *supra* note 92, at 459-60.

⁹⁶ *Id.* at 458.

⁹⁷ *Id.* at 461.

⁹⁸ *Id.* at 476-77.

⁹⁹ *Id.* at 476.

¹⁰⁰ 380 U.S. 592 (1965).

suppliers into satisfying their seasoning needs with purchases from the newly acquired subsidiary. The Court held that coerced reciprocity made possible by such an acquisition "is one of the congeries of anti-competitive practices at which the antitrust laws are aimed."¹⁰¹ The retailer's acquisition of the processing company under the circumstances of this case was felt to create a probability of reciprocal buying sufficient to invalidate the merger.

While this case is by no means solely a "size" case, the opinion of the Court does suggest the relevance of the size of the merging companies, particularly their size relative to that of those against whom reciprocity pressure may be exerted. The majority opinion states: "We do not go so far as to say that any acquisition, *no matter how small*, violates § 7 if there is a probability of reciprocal buying. Some situations may amount only to *de minimus*."¹⁰² The concurring opinion of Mr. Justice Stewart also discloses a sensitivity to size: "The food processing industry is composed basically of two classes of manufacturers. One class, which includes such processors as Armour and Swift, has built significant brand names commanding consumer acceptance of their products A second class incorporates the smaller processors in the industry."¹⁰³ Presumably Justice Stewart would outlaw only such reciprocity as involves pressure tactics by a member of the "large size" group against one of the "juniors."

CONCLUSION

"Mere size is not an offense" ¹⁰⁴ Or is it?

Surely the current movement of the law is away from that classic antitrust doctrine. The Supreme Court's decisions in 1964 almost add up to a rule of per se illegality for mergers of "large" companies, a holding that mere size is an offense under the federal merger laws, regardless of whether power is abused or exercised.

True, it is arguable that in each of the above cases appropriate economic considerations other than absolute size support the decisions. *Brown Shoe* involved a pronounced trend toward concentration; *Philadelphia Bank* and *Lexington Bank* had a heavy market share with which to reckon; *El Paso* had a virtual monopoly, albeit regulated; *Rome Cable* raised the spectre of a yesteryear monopolist; *Penn-Olin* had the potential competition aspect; *Continental Can* the overlapping of related product lines; and *Consolidated Foods* involved the reci-

¹⁰¹ *Id.* at 594.

¹⁰² *Id.* at 600. (Emphasis added.)

¹⁰³ *Id.* at 607.

¹⁰⁴ *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932).

procuity gimmick. But in all, the Court's prepossession with size seems very evident.

To be sure, no court has yet gone so far as to specifically hold that mere size invalidates a merger. But does *mere* size ever really exist? Is there such a thing as absolute size without its inevitable complement of side effects? The Federal Trade Commission disclaimed size as its basis for invalidating the Procter & Gamble merger; instead the decision was attributed to the quantity discount advantages and financial strength gained from size. This is like permitting the shooting of tigers but only if they have no stripes. Size does not exist in a vacuum. Unmarked tigers are pretty rare.

If the FTC opinion in *Procter & Gamble* reaches the United States Supreme Court, and if that Court adopts the philosophy that efficiencies of scale, quantity discounts, and other paraphernalia of size are to be numbered among the "congeries" of anticompetitive strength which section 7 was designed to guard against, big business will be virtually foreclosed from any growth by merger.

And if mergers involving large companies are to cease, will this not just about bring an end to corporate buying and selling of assets and stock? It is the large companies which constitute the most likely buyers of salable businesses.¹⁰⁵

But the Court has *not* yet endorsed the FTC decision in *Procter & Gamble*, nor has it been called upon to consider the pure conglomerate. One still need not conclude that the Supreme Court will concoct an instant merger test based on size alone.¹⁰⁶ Instead, the

¹⁰⁵ Address by Carl Kaysen, The Impact of Antitrust on Economic Growth, National Industrial Conference Board, March 4, 1965. He pointed out that "if those buyers [the largest 100] are removed from the market [as potential acquirers], perhaps the average price that sellers will realize for their assets will be lower." The cost of such an anti-merger policy could fall on the small and medium size firms rather than the big ones.

Another student of business has noted that mergers are a wholesome stimulant to economic growth.

Quite often a small businessman will start a new venture in the expectation that if it flourishes, and for some reason he does not choose to stay in the business, he can sell out at a profit. If he sees this ultimate "right of exit" endangered by antimerger decisions, he is likely to become a good deal less venturesome.

Address by M.J. Rathbone, *supra* note 9.

¹⁰⁶ Dissents, of course, do not make current law. But sometimes they do presage the future. Twenty years ago Mr. Justice Douglas, distressed at what he deemed to be favors shown big business in *Standard Oil Co. v. United States*, 337 U.S. 293, 317-18 (1948), complained:

[W]hen it comes to monopolies built in gentlemanly ways—by mergers, pur-

Court may continue to hold as it did in *Brown Shoe*: there is no quick and easy analysis of what complies with and what violates section 7, but rather there must be undertaken a functional, meaningful study of each merger in the context of its industry and in the full light of objective, open-minded criteria. The probable lessening of competition and the tendency to monopolize required to be proven by the Clayton Act should be established by the showing of something more than "mere size." The importance of continuing to stimulate the vigor of American economy, large and small firms alike, would seem to call for only the most careful application of the brakes to the expanding business activity of important companies.

It is to be hoped that sound economic analysis will prevail over the occultism of antitrust by the numbers.

chases of assets or control and the like—the teeth have largely been drawn from the Act.

* * * * *

The lessons Brandeis taught on the curse of bigness have largely been forgotten in high places. Size is allowed to become a menace to existing and putative competitors. Price control is allowed to escape the influences of the competitive market and to gravitate into the hands of the few, but beyond all that there is the effect on the community when independents are swallowed up by the trusts and entrepreneurs become employees of absentee owners These are the prices the nation pays for the almost ceaseless growth in bigness on the part of industry.

With the current wave of Supreme Court decisions striking down every large company acquisition presented to it, Justice Harlan has now taken Justice Douglas' place as the strong dissenter, objecting to "the bludgeon with which the Court now strikes at combinations which may well have no fault except 'bigness'" and complaining of the "travesty of economics" and "mock-statistical analysis" indulged in by the Court to justify the anti-bigness decisions.

Perhaps the pendulum will come to rest somewhere between those two viewpoints and the big business components of the nation will neither "wax strong" in the light of special favor from the Court nor be "bludgeoned" for the sole sin of bigness.